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NUMBER

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

MICHAEL KELLY

VS.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT
(COURT OF APPEALS NUMBER 82-1539
EASTERN DISTRICT OF PENNSYLVANIA
CRIMINAL NUMBER 82-43-2)

PETITION FOR WRIT OF CERTIORARI

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SUITE 856 - PUBLIC LEDGER BUILDING
BETWEEN 6th AND 7th ON CHESTNUT STREET
PHILADELPHIA, PENNSYLVANIA 19106

I. QUESTION PRESENTED FOR REVIEW

Whether facts found by a Trial Judge in the process of concluding that a consent to permit telephone conversations to be recorded was involuntary are subject to the "clearly erroneous" standard of review of Federal Rule of Procedure 52(a) as are analgous findings.

II. ADDITIONAL PARTY TO THE PROCEEDINGS:

STEPHEN KELLY - Court of Appeals For The Third Circuit Number 82-1541, District Court Number 82-43-1.

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IV. TABLE OF AUTHORITIES

V. JURISDICTIONAL STATEMENT

This petition seeks review of the judgment of the United States Court of Appeals for the Third Circuit dated May 31, 1983, reversing the District Court's order suppressing as evidence recordings and transcripts of certain telephone conversations.

This petition for Writ of Certiorari is being filed within sixty days of the denial of rehearing and rehearing en banc on June 24, 1983, as provided for in Rules 20.1 and 20.4 of the Rules of the Supreme Court of the United States. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

VI. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §2511(2)(c)

It shall not be unlawful under this chapter for a person acting under the color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. §2515

Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States, a State, or a political subdivision thereof if the disclosure of that information would be in violation of this chapter.

Federal Rule of Civil Procedure 52(a)

...Findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses.

VII. STATMENT OF THE CASE

1. Procedural History

Petitioner, Michael Kelly, was indicted in February, 19 82, on one count of conspiracy to manufacture and distribute methamphetamine (21 U.S.C. §846) and two counts of using a communication device in the commission of a felony (21 U.S.C. §843(b)). His brother, Stephen, was also indicted as a co-defendant and co-conspirator.

Both defendants challenged, in separate motions, the admissibility of one tape-recorded telephone conversation between an informant, Edward Bencsik and Stephen Kelly on January 2, 1982, and of two such conversations between Bencsik and Michael Kelly on January 4, 1982. After a hearing on July 6, 1982, the District Court ruled that the tapes would be admissible against Stephen Kelly. A second hearing was held on August 23, 1982, because counsel for Michael Kelly had not been notified of the July 6 hearing. The District Court initially ruled that the tapes were admissable, but reversed himself the next morning, August 24, 1982, (26a-27a). On August 25, 1982, further argument was permitted after which the Court persisted in holding to its view, expressed of that hearing ". . .that in the totality of this situation, that the Government has not proved by a preponderance of the evidence that the consent was valid". (35a).

The Government appealed on September 7, 1982, to the United States Court of Appeals for the Third Circuit. On May 31, 1983, a panel of that Court, by a 2-1 vote reversed the District Court in an opinion reported at 708 F.2d. 121 (1a-8a). Rehearing and rehearing en banc were denied on June 24, 1983.

2. Factual History

During January, 1982, Edward Bencsik lived at the apartment of a friend named Charles Clarkson. The Government contends that on January 1, 1982, Stephen Kelly went to Bencsik's apartment and subsequently forced him to turn over the keys to a car which was then taken as security for a debt allegedly arising from drug dealings involving Bencsik and the Kellys. (11a-12a). Bencsik was in the process of buying the car from a friend of Clarkson's who was still the titled owner.

On January 2, 1982, Bencsik told Clarkson that Stephen and Michael Kelly had taken his automobile the previous day as security for money they had advanced to Bencsik in a drug deal. Clarkson responded by insisting that the car be reported to the police as stolen. Clarksen led Bencsik to believe that he was merely going to report the car as stolen. However, when a police officer arrived Clarkson spoke to him out of Bencsik's presence and described in hypothetical terms the situation Bencsik had related to him. The officer left the scene and returned to Clarkson's apartment shortly thereafter with Bensalem Township Police Chief Richard Viola. Before Viola and the officer returned Clarkson related to Bencsik what he had told the officer and suggested the Bencsik cooperate with the police.

When Chief Viola arrived at Clarkson's apartment on the evening of January 2, 1982, he asked Bencsik whether the "hypothetical" situation which Clarkson had related had actually occurred. After Bencsik confirmed the information, Bencsik was asked to place a recorded telephone call to the Kellys to verify the accuracy of his account. Bencsik agreed. The circumstances surrounding that

agreement were the focus of the motions litigated below and of the trial court's ruling, and are referred to in detail in the argument held August 25 (25a-29a) and in the opinions of the District Court (9a-20a) and of the Court of Appeals (1a-8a).

VIII. REASONS FOR ALLOWANCE OF THE WRIT

When the District Court refused to find that the informant Bencsik's consent was voluntary it is clear that the court was talking about "voluntariness" as an internal psychic state not as the characterization of that for legal purposes. cf. Culombe v. Connecticut, 367 U.S. 568 604-5, 81 S.Ct. 1860, 1881 (1961). The entire tenor of the argument of August 25 (28c-49a) and the factors relied on by the District Court (i.e. drug use by Bencsik at the time of the calls, assuances of help from authorities, pressure from his "friend" Clarkson and the highly suggestible nature of Bencsik himself) (16a; 5a-6a) make it clear that the District Court was engaged in fact-finding and not in applying "Standards of Judgment" to those facts. (Id)

When that process results in a finding of voluntariness of a confession the Third Circuit requires the defendant to show that the finding was clearly erroneous, e.g. United States v. Dickens, 695 F.2d 765,778 (3rd Cir. 1982). Furthermore, in the case of reviewing so-called ultimate facts in which fact-finding and applying standards of judgment are entwined, the Third Circuit applies the "clearly erroneous" standard of review to the fact-finding component of that enterprise. Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98 (3rd Cir. 1981) This case, which involves the related statutory question of voluntariness of consent to the overhearing of a telephone conversation, which was pending before the Third Circuit when Dickens was decided. Yet in this case the Third Circuit reversed a finding of involuntariness because they disagreed with the trial court's result:

> [W]e must hold that the trial court erred when it determined that Bencsik did not voluntarily consent to the recording of his conversations with the Kellys.

United States v. Kelly, 708 F.2d 121, 125 (3rd Cir. 1983)(5a). (emphasis supplied)

> While we agree...that...examination of the circumstances is not limited solely to instances of governmental misconduct... we cannot agree that the other factors identified by the judge lead to a finding... that Benisck did not voluntarily consent.

Idem. (emphasis supplied)

We acknowledge the district court's primary role in making the determination of voluntariness and we recognize the careful approach to the problem by the trial judge below. On this record, however, we must hold that his conclusions were errneous. Fed. R. Cir. P. 52(a)

Idem. (emphasis supplied)

Nowhere in its opinion does the panel suggest that the trial court relied on an improper legal standard; to the contrary they agree that the question is one of fact to be determined from the totality of the circumstances. 708 F.2d at 125(5a). The dissent agrees with that as well and asserts that "[m]oreover, I agree with the majority that since voluntariness of the consent is a factual matter the scope of reive is the clearly erroneous standard of Fed. R. Cir. P. 52(a).

Yet it cannot be that the majority applied that standard of review of Rule 52a which provides inter alia that "[f]indings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Fed. R. Cir. P. 52(a), supra, p. 6. "Clearly erroneous" was defined by this Court in United States v. United States Gypsum Company, 333 U.S. 364, 395, 68 S.Ct. 525, 542 (1948):

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definit and firm conviction that a mistake has been commited.

The majority never explicity invoked either the rule or the definition, and its analysis of the record in the District Court does not show compliance with either: When the Court of Appeals undertook to disagree with the District Court they invoked the testimony of Bencsik and they reversed the burden of proof, both at the appellate review level and at the trial level with regard to the finding required by the statute, 18 U.S.C. §2511(2).

In resorting to Bencsik's testimony they totally disregard the trial court's refusal to credit Bencsik's testimony. In his opinion the District Court wrote (17a-18a)

The Government claims that Bencsik's own testimony as to the voluntary nature of his consent must be considered controlling...

> [I]t defies common sense that, at a hearing in which one of the factors legitimately in dispute is the impressionable nature of the subject's mind, a district judge acting as trier of fact must take at face value statements of the subject regarding his mental state at a point in the part.

Furthermore, the following exchange at the hearing on August 25 aptly illustrates the trial court's focus on and attitude toward Bencsik's testimony (38a-39a):

> Mr. Sherman [Assistant United States Attorney]: You asked him a series of questions...and he [i.e. Bencsik] still said that he did it voluntarily. The Court: Yes. He did say he did it voluntarily. Mr. Sherman: And he was quite adamant about that....The Court: Yes. He said the right words on the 23rd at times

> during the hearing. But, he also said words that caused me to scrutinize his testimony.

References to his testimony were the sole response to the District Court's consideration of pressure from Clarlson. 708 F.2d at 126(6a), and the principal response to the assurances of help from Viola as factors affecting Bencsik's state of mind at the time of the calls. Nowhere does the Court of Appeals give the slightest regard, as required by Rule 52(a), for the fact that the trial judge saw and heard the witness and refused to believe him.

With respect to the other two factors relied on by the Court, drug use and Bencsik's highly suggestible nature, the Court of Appeals resorts to the record to downplay the significance of those factors (Bencsik testified that he didn't remember what drugs he took but that whatever he took [that he couldn't remeber] didn't affect his thinking]; 708 F.2d at 126) what the trial judge saw in Bencsik's demeanor as suggestibility the Court of Appeals reversed the burden of proof. "The record does not show that his drug use prevented him in any way from consciously and independently reaching his decision." 708 F.2d at 126. "...there is no evidence in the record to indicate that Bencik was incapable of making an independant free decision..." Not only do those remarks erroneoulsy put the burden of proof on a defendant to prove lack of consent rather than on the government to prove consent (so as to bring the evidence within an exception to a general rule of exclusion) e.g. United States v. First City National Bank of Houston, 386 U.S. 361, 366, 87 SCt. 1088, 1092 (1967) and see Lego v. Twomey, 404 U.S. 477 (1972)(prosecutor has burden to prove confession is voluntary), but they also deny to the defendants herein the benefit

of the trial court's findings of fact in plain violation of Rule 52's command that they will retain the benefit of those findings unless the appellee shows that the findings were clearly erroneous. F.M. Palmer Company v. Luden's Inc. 236 F.2d 496 (3rd Cir. 1956); Arkansas Education Association v. Board of Education, 446 F.2d 763, 770 (8th Cir. 1971).

During the hearings in this case the government conceded that in no case had a court of appeals reversed a trial judge's finding of voluntariness. (31a) In a rare case, this trial judge, principally in respone to what he detected in the demeanor and appearance of a witness testifying before him, struggled with the factual aspect of voluntariness as a state of mind and found that the government had not convinced him by a preponderance of the evidence that Bencsik's consent was voluntary. The reversal by the Third Circuit comes in an opinion which demonstrates that that Court applied an incorrect legal standard that conflicts with the clear language of Rule 52(a) and which conflicts with its own cases setting forth the standard which defendants must meet to overcome pro-government findings of voluntariness in the analgous area of confessions and which results in a blurring of responsibilities between trial level and appellate courts in a situation where appellate courts are peculiarly unsuited to substitute their judgment for that of a factfinder reacting to live witnesses.

This writ should be granted to resolve an important question in the interpretation of Rule 52(a), in the even-handed administration of the criminal law and to resolve an intra-circuit conflict between this case on the one hand and

United States v. Dickens and Universal Minerals, Inc. v. C.A. Hughes & Company, 669 F.2d 98 (3rd. Cir. 1981) on the other which alter the standard of review making it easier for the government than for individuals to obtain reversals of adverse findings.

Respectfully submitted,

JOSEPH M. MILLER
Assistant Defender

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MICHAEL KELLY

VS.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES
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The district court's order of September 3, 1982, granting the United States' motion to dismiss will be reversed, and this action will be remanded for further proceedings consistent with this opinion.[9]

UNITED STATES of America,
Appellant,

v.

KELLY, Michael, Appellee in No. 82-1539

and

UNITED STATES of America, Appellant

v.

KELLY, Stephen, Appellee in
No. 82-1541.

Nos. 82-1539, 82-1541.

United States Court of Appeals,
Third Circuit.

Argued Feb. 18, 1983.

Decided May 31, 1983.

Rehearing and Rehearing En Banc
Denied June 24, 1983.

The Government appealed from pretrial orders of the United States District Court for the Eastern District of Pennsylvania, Edward N. Cahn, J., suppressing evidence in criminal prosecution. The Court of Appeals, James Hunter, III, Circuit Judge, held that witness' consent to tape recording of telephone conversations with defendants was voluntary.

Reversed and remanded.

Gibbons, Circuit Judge, dissented and filed opinion.

1. Constitutional Law ⇐82(7)

It does not violate individual's constitutional or statutory privacy interests to introduce at criminal trial tape recordings of his private conservations if other party to those conversations voluntarily consented to their recording.

2. Telecommunications ⇐496

Determining whether a person's consent to recording of phone conversation is voluntary is not simple task; it is question of fact, which court must determine from totality of circumstances.

3. Telecommunications ⇐496

Consent to wiretap is not voluntary where it is coerced, either by explicit or implicit means or by implied threat or covert force.

4. Telecommunications ⇐496

Individual's decision to allow police to record phone conversation is not necessarily involuntary just because that individual's motives were self-seeking or because he harbored expectations of personal benefit; rather, consent will be considered voluntary if, from totality of circumstances, trial court determines that party agreeing to wiretap did so consciously, freely, and independently and not as a result of coercive overbearing of his will.

5. Telecommunications ⇐496

Witness' consent to tape recording of telephone conversations between him and defendant charged with drug offenses was voluntary where Drug Enforcement Administration agents did not directly apply any coercion to obtain witness' cooperation, there was no evidence that witness' drug use impaired his judgment, agents' noncommittal assurances of help in witness' state criminal matter were not determinative in

and *Barbieri v. News-Journal Co.*, 56 Del. 67, 189 A.2d 773 (Del.1963) (invasion of privacy).

9. In reversing the district court's order granting the government's motion to dismiss, we of course do not address the merits of any of Valn's claims against the United States. We also do not preclude the government from raising any defenses to the merits on remand to the district court.

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witne[illegible]ision to make phone calls, and witne[illegible]eatedly and consistently testified th[illegible]oluntarily agreed to monitoring of ca[illegible]

Frank She[illegible]rgued), Asst. U.S. Atty., Peter F. V[illegible] Atty., Walter S. Batty, Jr., Asst. U.S. [illegible]Chief of Appeals, Philadelphia, Pa., for [illegible]ent.

Steven Morley (argued), Asst. [illegible]efender, Defender Ass'n of Philadelphia, Federal Court Div., Philadelphia, Pa., for Michael Kelly.

Mary McNeill Zell (argued), Barry H. Denker, Philadelphia, Pa., for Stephen Kelly.

Before GIBBONS, HUNTER and ROSENN, Circuit Judges.

OPINION OF THE COURT

JAMES HUNTER, III, Circuit Judge:

The United States appeals from two pretrial orders entered by the United States District Court for the Eastern District of Pennsylvania suppressing evidence in the federal criminal prosecutions of Stephen Kelly and Michael Kelly. The government had planned to introduce three tape-recorded phone conversations between the Kellys and Edward Bencsik involving an alleged deal to buy phenyl-2-propanone. The district court suppressed the tape recordings and their transcripts because it found that Bencsik had not voluntarily consented to the monitoring of the phone conversations. We will reverse.

I

Facts

In January of 1982, Edward Bencsik was living in Bensalem Township, Pennsylvania at the apartment of a friend, Charles Clarkson. The government contends that on the evening of January 1, 1982, Stephen and Michael Kelly went to Bencsik's apartment and forced Bencsik at gunpoint to turn over the car keys to a 1969 Plymouth GTX which was parked in his driveway.[1] The Kellys allegedly took the car as security for $2000 that Michael Kelly had advanced Bencsik in a drug deal. The next evening Bencsik told Clarkson that the car had been taken by the Kellys as collateral for the $2000. Clarkson, concerned over the disappearance of the car, insisted on telephoning the police to report that it had been stolen. A Bensalem Township police officer arrived at Clarkson's apartment and, while Bencsik waited outside, Clarkson presented to the investigating officer an outline of Bencsik's dealings with the Kellys in hypothetical terms. After the officer left, Clarkson brought Bencsik back into the apartment and suggested to him that he should cooperate with the police.

A short time later the officer returned, accompanied by Bensalem Township Police Chief Richard Viola. Viola discussed with Bencsik his actual dealings with the Kellys and asked him if he would be willing to phone the Kellys to verify what had happened. Bencsik agreed. During that discussion Clarkson brought up that Bencsik had a pending criminal charge in Bucks County, Pennsylvania, and asked Viola if he could assist Bencsik in resolving it. Viola was non-committal but said that he would look into the matter.

That same evening Viola contacted DEA Special Agent Richard Compton who Viola knew was involved in an active investigation of Stephen Kelly. Viola and Compton agreed to meet with Bencsik at Viola's apartment to record Bencsik's phone call. When Compton arrived he spoke with Bencsik about the investigation and told him that he wanted to record a conversation between Bencsik and either Stephen or Michael Kelly. Compton suggested certain topics that Bencsik could mention in the phone call but did not specify what Bencsik should say. He also explained that he needed Bencsik's consent to tape-record the call.

1. The Plymouth GTX had been sold to Bencsik by Clarkson's girlfriend. At the time the Kellys allegedly seized the car, Bencsik owed Clarkson's girlfriend a substantial balance on the car, and title was still in her name.

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Bencsik agreed to the recording and the monitoring of the call. Compton dialed the Kellys' number, and Bencsik spoke with Stephen Kelly for several minutes. Compton listened to and recorded that conversation.

On the morning of January 4, 1982, Bencsik went to the Bensalem Township Police Department and was fitted with a body recorder. Shortly after noon he returned to Clarkson's apartment where he met with Clarkson, Compton, and Viola. Compton asked Bencsik if he could monitor another call between Bencsik and the Kellys. Bencsik agreed. Bencsik called the Kellys, and Compton recorded a conversation between Bencsik and Michael Kelly. Later that afternoon Compton asked Bencsik to make another call. Bencsik again agreed, and Compton recorded a second conversation between Bencsik and Michael Kelly. Both Kellys were arrested later that day.[2]

Bencsik testified that between January 2 and January 4 he probably used either marijuana or methamphetamine. Although he could not remember exactly what drugs he might have taken, Bencsik described himself as a fairly regular user of methamphetamine, Demerols, and marijuana during that time period. Bencsik stated, however, that the drugs did not impair his ability to reason and think and that his usage was "[n]ot to an extent [that] I wasn't in touch with reality." App. at 176A–77A.

On the evening of January 6, Bencsik again met with Clarkson, Compton, and Viola. The subject of Bencsik's possible relocation to ensure his personal safety came up as well as Clarkson's concern over being paid for the car. The following day Compton gave Bencsik $1000 in cash from DEA funds. Bencsik paid Clarkson $700 to cover the balance owed on the car and kept the remainder for relocation expenses. At no time prior to the making of the tape-recorded conversations did either Compton or Viola express or imply to Bencsik that he would be paid any money for giving his consent to the recordings.

Proceedings Below

On February 8, 1982, a federal grand jury indicted Stephen and Michael Kelly for their alleged involvement in an unlawful plan to manufacture and sell drugs. Stephen Kelly was charged with conspiracy to manufacture, distribute, and possess with intent to distribute controlled substances in violation of 21 U.S.C. § 846 (1976), with using a firearm to commit a felony in violation of 18 U.S.C. § 924(c)(1) (1976), and with knowingly and intentionally using a telephone in facilitating the commission of a felony in violation of 21 U.S.C. § 843(b) (1976). Michael Kelly was charged with conspiracy to manufacture, distribute, and possess with intent to distribute controlled substances in violation of 21 U.S.C. § 846 (1976), and with two counts of knowingly and intentionally using a telephone in facilitating the commission of a felony in violation of 21 U.S.C. § 843(b) (1976).

Prior to trial the defendants moved for a hearing to determine the admissibility of the three recorded phone conversations. *See United States v. Starks*, 515 F.2d 112 (3d Cir.1975). On July 6, 1982, the district court held an evidentiary hearing on defendants' motion. After listening to testimony from Compton and Bencsik, the district court tentatively ruled that the tapes were admissible. It based its ruling upon a determination that the tapes were audible, that a proper chain of custody had been established, and that Bencsik had consented to the recording of the conversations by Compton. Because Michael Kelly's appointed counsel had not received notice of the July 6 hearing, the court held another hearing on August 23, 1982. At the end of that hearing, the trial judge again ruled that the

2. Sometime prior to the two January 4 phone calls, Viola allegedly told Bencsik that Bencsik was late for a court date in his Bucks County criminal matter and therefore was subject to arrest. Bencsik stated, however, that he knew that he was not late for any hearings and that he neither believed nor was influenced by Viola's claim. App. at 112A–13A. Although Viola attempted to intercede in Bencsik's behalf, on January 6, 1982, Bencsik entered a plea of guilty in that case and was placed on probation.

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tapes were admissible. The following morning, however, the judge reversed his ruling and held the tapes inadmissible. After hearing further oral argument on August 25, the trial judge issued his final orders excluding the tapes and their transcripts.

In his written opinion the trial judge stated that "[t]he critical factor in my decision to suppress the tapes was my determination that Edward Bencsik had not consented voluntarily to police monitoring of his conversations with the Kellys." *United States v. Stephen J. Kelly and Michael Kelly*, Crim. No. 82–00043, slip op. at 2 (E.D.Pa. Feb. 4, 1983). Citing *United States v. Santillo*, 507 F.2d 629 (3d Cir.), *cert. denied*, 421 U.S. 968, 95 S.Ct. 1960, 44 L.Ed.2d 457 (1975), and section 802 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90–351, § 802, 82 Stat. 197, 212–23,[3] the trial judge ruled that, if Bencsik did not voluntarily consent to the recordings of the phone conversations then those recordings were an unreasonable invasion of the Kellys' privacy and had to be suppressed. *Kelly*, slip op. at 2–3. Reviewing the testimony the trial judge found that although Compton and Viola had not "applied directly any coercion, physical or psychological, to Bencsik to obtain his cooperation," *id.* at 6, his consent "was impermissibly clouded" by several factors: his possible drug use, his apprehension of physical harm at the hands of the Kellys, the pressure from Clarkson, the assurances of help from Viola and Compton, and Bencsik's own "highly suggestible nature." *Id.* at 8. Viewing all of the surrounding circumstances, the trial judge found that Bencsik's consent was not voluntary, and thus he suppressed the tapes.

II

[1] As properly recognized by the trial court below, it does not violate an individual's constitutional or statutory privacy interests to introduce at a criminal trial tape recordings of his private conversations if the other party to those conversations voluntarily consented to their recording. *United States v. Caceres*, 440 U.S. 741, 744, 99 S.Ct. 1465, 1467, 59 L.Ed.2d 733 (1979); *United States v. White*, 401 U.S. 745, 750–51, 91 S.Ct. 1122, 1125, 28 L.Ed.2d 453 (1971) (plurality opinion); *United States v. Moskow*, 588 F.2d 882, 891 (3d Cir.1978); *United States v. Santillo*, 507 F.2d 629, 631–34 (3d Cir.), *cert. denied*, 421 U.S. 968, 95 S.Ct. 1960, 44 L.Ed.2d 457 (1975); *United States v. Osser*, 483 F.2d 727, 730 (3d Cir.), *cert. denied*, 414 U.S. 1028, 94 S.Ct. 457, 88 L.Ed.2d 321 (1973); 18 U.S.C. § 2511(2)(c) (1976); *see* S.Rep. No. 1097, 90th Cong., 2d Sess. 66, 93–94, *reprinted in* 1968 U.S.Code Cong. & Ad.News 2112, 2153, 2182.[4] "The principle underlying [that rule] is that when one reveals information to an individual, one takes the risk that one's confidence in that individual is misplaced." *Flaherty v. Arkansas*, 415 U.S. 995, 999, 94 S.Ct. 1599, 1601, 39 L.Ed.2d 893 (1974) (Douglas, J., dissenting from the denial of certiorari). Neither the Constitution nor an Act of Con-

3. In enacting Title III Congress created a comprehensive scheme for the regulation of wiretapping and electronic surveillance. *Gelbard v. United States*, 408 U.S. 41, 46, 92 S.Ct. 2357, 2360, 33 L.Ed.2d 179 (1972). The statute contains a strict exclusionary rule which prohibits the use of the contents of any communication "in any trial, hearing, or other proceeding in or before any court ... if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515 (1976). The Act provides, however, for several situations where disclosure is allowed. That part of the statute relevant to the instant appeal states:

> (2)(c) It shall not be unlawful under this chapter for a person acting under the color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2511(2)(c) (1976). *See generally United States v. Cianfrani*, 573 F.2d 835, 854–59 (3d Cir.1978).

4. In its opinion the district court addressed the consent issue in terms of privacy interests. For the purposes of this case, the district court's ruling that the Kellys' privacy interests were not violated because Bencsik voluntarily consented to the tape recordings is sufficient to establish the voluntariness requirement listed in footnote 11 of our opinion in *United States v. Starks*. *See Starks*, 515 F.2d at 121 n. 11.

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gress affords protection "to a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it." *Hoffa v. United States*, 385 U.S. 293, 302, 87 S.Ct. 408, 413, 17 L.Ed.2d 374 (1966). Thus no justifiable expectation of privacy is violated if the government subsequently uses that conversation at trial.

[2–4] Determining whether a person's consent to the recording of a phone conversation is "voluntary" is not a simple task. *See Culombe v. Connecticut*, 367 U.S. 568, 604–05, 81 S.Ct. 1860, 1880, 6 L.Ed.2d 1037 (1961) (opinion of Frankfurter, J.). It is a question of fact, which the court must determine from the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2047, 36 L.Ed.2d 854 (1973); *United States v. Sanford*, 673 F.2d 1070, 1072 (9th Cir.1982); *United States v. Brandon*, 633 F.2d 773, 776 (9th Cir.1980).[5] Consent to a wiretap is not voluntary where it is coerced, either by explicit or implicit means or by implied threat or covert force. *Schneckloth*, 412 U.S. at 228, 93 S.Ct. at 2048; *Osser*, 483 F.2d at 730. An individual's decision to allow the police to record a phone conversation, however, is not necessarily involuntary just because that individual's motives were self-seeking, or because he harbored expectations of personal benefit. *Moskow*, 588 F.2d at 891; *Osser*, 483 F.2d at 730. Rather consent will be considered voluntary if, from the totality of the circumstances, the trial court determines that the party agreeing to a wiretap did so consciously, freely, and independently and not as the result of a coercive overbearing of his will.

[5] Turning to the instant case, the trial court was correct in looking at the totality of the circumstances to determine the issue of voluntariness. After a thorough and extensive review of the record, however, we must hold that the trial court erred when it determined that Bencsik did not voluntarily consent to the recording of his telephone conversations with the Kellys. The record reveals, as the trial court itself found, that Compton and Viola did not directly apply any coercion, physical or psychological, to Bencsik to obtain his cooperation in the monitoring of the telephone calls. *Kelly*, slip op. at 6; app. at 279A, 230A–31A, 238A, 248A. Bencsik testified that he consented to the recordings, app. at 89A, 99A, 105A, 227A–31A, and that he knew he did not "have to go along" with the police at the time he decided to cooperate, app. at 227A.[6] As the trial court stated, "there is no question" that he agreed to the tape recordings of his conversations with the Kellys. App. at 279A.

Despite the lack of official coercion, the trial judge refused to find that Bencsik voluntarily agreed to the recordings. While we agree with the trial judge that his examination of the circumstances is not limited solely to instances of governmental misconduct, see app. at 282A, 287A, we can not agree that the other factors identified by the judge lead to a finding in this case that Bencsik did not voluntarily consent to the tape recordings. First, the trial court pointed to Bencsik's possible drug use at the time the phone calls were recorded. The only evidence on the record about Bencsik's drug use was his own testimony. He stated

5. We reject the government's argument that the Second Circuit's decision in *United States v. Bonanno*, 487 F.2d 654 (2d Cir.1973), requires us to apply a different test for determining whether an informer consented to the monitoring or recording of a telephone call. The government contends that *Bonanno* holds that a district court, when determining voluntariness, should only examine whether an informer went ahead with a phone call knowing that it was being recorded by the police. We disagree. We read Judge Friendly's decision as merely recognizing that the factual issue of consent is slightly different in cases where the defendant's consent to a physical search is at issue. In those cases the trial court has to determine whether the *defendant* voluntarily consented to a search contrary to his own interests, rather than whether an *informer* voluntarily consented to a decision "which he has ordinarily decided sometime previously and [which] entails no unpleasant consequences." *Id.* at 658.

6. On the same day that he made the second and third phone calls, Bencsik voluntarily went to the police station to be fitted with a body recorder. App. at 171A–72A.

that he could not specifically remember what drugs, if any, he had taken on January 2 or on January 4. He stated, however, that any drugs he might have taken did not impair his "ability to reason and [to] think things through." App. at 176A. Neither Compton nor Viola was aware that Bencsik was using any drugs at the time the phone calls were made. App. at 66A, 201A. As the trial court itself recognized, "[t]here is no evidence that those drugs impaired his judgment." App. at 237A. Second, the trial court cited the assurances of help from Viola and Compton in support of its finding that Bencsik's consent was not voluntary. Bencsik testified, however, that Viola's noncommittal assurances of help in the Bucks County matter were not determinative in his decision to make the phone calls. App. at 99A, 105A. Bencsik was actually unaware that Viola ever interceded in his behalf. App. at 109A. Compton did eventually pay Bencsik $1000 out of DEA funds but it was Clarkson, not Bencsik, who initiated discussion about those funds, app. at 179A, 190A–91A, 202A, and that discussion did not occur until *after* Bencsik had made all three phone calls, app. at 108A, 168A, 185A; 189A–90A. Third, the trial court voiced concern about the pressure put on Bencsik by Clarkson. See app. at 165A, 223A–24A. Bencsik did testify that Clarkson had put him on the "spot," app. at 227A, yet stated that he still made the phone calls voluntarily and that he "realized [that he] really didn't have to go along with it" if he did not want to cooperate, app. at 227A, 230A.[7] Finally, the trial judge stated that based on his appearance at the August 23 hearing, he felt that Bencsik had a "highly suggestible nature." *Kelly*, slip op. at 8; app. at 247A, 280A, 282A–83A. While his testimony does reveal that Bencsik was somewhat confused at times at the August 23 hearing, there is no evidence in the record to indicate that Bencsik was incapable of making an independent free decision at the time the recordings were made.

We hold that the instant record clearly establishes that Bencsik voluntarily consented to having his phone conversations with the Kellys recorded. Bencsik repeatedly and consistently testified that he voluntarily agreed to the monitoring of the calls by Compton. The record does not show that his drug usage prevented him in any way from consciously and independently reaching his decision. *See United States v. Marcello*, 508 F.Supp. 586, 599–601 (E.D. La.1981); *United States v. Cafaro*, 480 F.Supp. 511, 521–22 (S.D.N.Y.1979). Bencsik's decision to cooperate, although perhaps self-serving, was not based on inducements which rose to the level of an overbearing of his will. *See United States v. Horton*, 601 F.2d 319, 322 (7th Cir.), *cert. denied*, 444 U.S. 937, 100 S.Ct. 287, 62 L.Ed.2d 197 (1979); *Moskow*, 588 F.2d at 891; *United States v. Juarez*, 573 F.2d 267, 278 (5th Cir.), *cert. denied*, 439 U.S. 915, 99 S.Ct. 289, 58 L.Ed.2d 262 (1978); *Osser*, 483 F.2d at 730. Finally, even if Bencsik was put on the spot by Clarkson, the evidence does not establish that he was unable to make an independent judgment about whether to assist the police at the time the phone calls were recorded. We acknowledge the district court's primary role in making the determination of voluntariness, and we recognize the careful approach to the problem by the trial judge below. On this record, however, we must hold that his conclusions were erroneous. Fed.R.Civ.P. 52(a).

III

We will reverse the district court's orders of August 25, 1982, suppressing the tape recordings and their transcripts, and we will remand this cause to the district court for further proceedings consistent with this opinion.

GIBBONS, Circuit Judge, dissenting.

The government appeals from an order suppressing a recording of a telephone con-

7. The district judge also noted in his opinion that Bencsik's "apprehension of death or physical harm at the hands of the Kellys," *Kelly*, slip op. at 8, was a factor which "clouded" Bencsik's consent to the wiretap. We disagree. The Kellys will not be heard to complain that their threats tainted Bencsik's consent to assist the police. See app. at 283A–84A.

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versation. It is undisputed that Section 802 of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Pub.L. No. 90–351, § 802, 82 Stat. 197, 212–23, 18 U.S.C. § 2515, mandates suppression unless "one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c) (1976). The majority holds that the voluntariness of such consent controls as a matter of law the suppression of the recording, and that voluntariness is a question of fact which the court must determine from the totality of the circumstances. I completely agree with the majority that "consent will be considered voluntary if, from the totality of the circumstances, the trial court determines that the party agreeing to a wiretap did so consciously and independently and not as a result of a coercive overbearing of his will." Typescript at 11. Thus I join in the majority's tacit rejection of the government's contention that for purposes of the wiretap statute consent should be equated with mere knowledge of what the law enforcement officers want.[1] The test is voluntariness in the classic sense of uncoerced free choice, determined from the totality of the circumstances, and, at least with respect to statutory issues such as that before us, the inquiry is factual. Moreover I agree with the majority that since voluntariness of the consent is a factual matter the scope of review is the clearly erroneous standard of Fed.R.Civ.P. 52(a).

At that point we part company. While the evidence certainly did not compel the conclusion that Edward Bencsik's consent to interception of telephone conversations to which he was a party was coerced, I am unable to hold that the carefully considered conclusion of the trial court to that effect "(1) is completely devoid of minimum evidentiary support displaying some hue of credibility, or (2) bears no rational relationship to the supportive evidentiary data." *Krasnov v. Dinan*, 465 F.2d 1298, 1302 (3d Cir.1972). Certainly the majority has not established the existence of either of those factors. The *Krasnov–v. Dinan* standard for determining when a trial court's finding of fact is clearly erroneous should be applied rigorously in all cases, but especially in cases where, as here, the factual determination depends so much upon the factfinder's face to face evaluation of the witnesses. Rule 52(a) explicitly cautions that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

Judge Cahn relied, in making his finding of coercion, on two factors. First, his assessment of Bencsik was that he has a suggestible character. We did not see or hear Bencsik, and we are in no position to second-guess Judge Cahn with respect to that character trait. Second, he concluded that Bencsik was on drugs during the period in which he gave his consent. The government urges that drug-taking does not necessarily affect capacity to consent. While this is true, it does not follow that drug taking *never* affects capacity to consent. Methamphetamine could have heightened Bencsik's feelings of peril, and caused him to perceive that he had no choice but to cooperate. Marijuana could have increased his suggestibility. There is evidence that both were used. The record also contains several instances of faulty memory. Finally there is evidence from which a factfinder could conclude that Police Chief Viola and Charles Clarkson exerted pressure on Bencsik to record this telephone conversation with Mr. Kelly.

After considering carefully over a period of more than twenty-four hours the impression that Bencsik made, and his testimony about the totality of circumstances in which he consented to record his telephone conversations, the court found as a fact that his consent was coerced. There is evidentiary support which bears a rational relationship to that finding. This court, which never saw or heard the witnesses, cannot substitute its own finding of fact for that of the trial judge who did. *Pullman-Standard v.*

1. This contention is predicated on a perhaps overbroad reading of *United States v. Bonanno*, 487 F.2d 654, 658–59 (2d Cir.1973).

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Swint, 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982). Thus I would affirm the order appealed from. Suppression is required by 18 U.S.C. § 2515 (1976).

Calvin Coolidge GREENE, Appellee,

v.

WHIRLPOOL CORPORATION, Appellant.

No. 82-1635.

United States Court of Appeals, Fourth Circuit.

Argued Feb. 10, 1983.

Decided May 31, 1983.

Discharged employee sued employer charging violation of Age Discrimination in Employment Act. The United States District Court for the Western District of North Carolina, James B. McMillan, J., 538 F.Supp. 352, rendered judgment on jury verdict for former employee, and employer appealed. The Court of Appeals, K.K. Hall, Circuit Judge, held that: (1) written charge alleging unlawful discrimination must be timely filed with the agency, and (2) the 180-day period was not tolled by employer's failure to post informational notices as employee had actual knowledge of the 180-day filing requirement.

Reversed.

Fairchild, Senior Circuit Judge, sitting by designation, filed concurring opinion.

1. Civil Rights ⇐33

Written charge alleging unlawful discrimination must be filed within 180 days after the alleged unlawful practice occurred in order to comply with Age Discrimination in Employment Act. Age Discrimination in Employment Act of 1967, § 7(d), as amended, 29 U.S.C.A. § 626(d).

2. Civil Rights ⇐38

Requirement of Age Discrimination in Employment Act that charge be filed with the agency within 180 days after alleged unlawful practice occurred is not a jurisdictional prerequisite to suit in federal court and under exceptional circumstances may be tolled or waived. Age Discrimination in Employment Act of 1967, § 7(d), as amended, 29 U.S.C.A. § 626(d).

3. Civil Rights ⇐33

The 180-day period for filing administrative charge under Age Discrimination in Employment Act was not tolled by employer's failure to post required informational notices on its premises where from employee's first visit to Department of Labor he acquired actual notice of fact that a charge must be filed within that period. Age Discrimination in Employment Act of 1967, § 7(d), as amended, 29 U.S.C.A. § 626(d).

John T. Allred, Charlotte, N.C. (Julia V. Jones, Moore & Van Allen, Charlotte, N.C., on brief), for appellant.

C. Michael Wilson, Charlotte, N.C. (Griffin, Gerdes, Mason, Brunson & Wilson, Charlotte, N.C., on brief), for appellee.

Before WIDENER and HALL, Circuit Judges, and FAIRCHILD,* Senior Circuit Judge.

K.K. HALL, Circuit Judge:

Whirlpool Corporation (Whirlpool) appeals from a judgment entered on a jury verdict for Calvin Coolidge Greene (Greene) in his suit alleging violation of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634. The issue for our consideration is whether Greene filed a charge of discrimination within 180

* Honorable Thomas E. Fairchild, Senior Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

8a

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	CRIMINAL NO. 82-00043
	:	
STEPHEN J. KELLY and MICHAEL KELLY	:	

MEMORANDUM OPINION

CAHN, J. February 4, 1983

On August 25, 1982, I granted the motion of the defendants, Stephen Kelly and Michael Kelly, to suppress as evidence the tape recordings of three telephone conversations. The Government seeks to use these recordings as part of its case against the defendants, each of whom has been charged with three counts relating to an alleged conspiracy to sell phenyl-2-propanone (P2P) and methamphetamine.[1] One of these recorded conversations took place on January 2, 1982, between Edward Bencsik and Stephen Kelly. The other two

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[1]Count One of the indictment charges both Stephen J. and Michael Kelly with conspiracy to possess with intent to distribute P2P and to manufacture and distribute methamphetamine. Counts Two and Three charge Stephen Kelly with using a firearm and a telephone in furtherance of the conspiracy. Counts Four and Five charge Michael Kelly with two instances of using a telephone in furtherance of the conspiracy.

conversations took place on January 4, 1982, between Edward Bencsik and Michael Kelly. The Government requested that the case not proceed so that it could appeal my order pursuant to 18 U.S.C. §3731, and I granted this request.

The critical factor in my decision to suppress the tapes was my determination that Edward Bencsik had not consented voluntarily to police monitoring of his conversations with the Kellys. The voluntariness of Bencsik's consent is the central issue in the suppression proceedings, and an issue which the defendants have standing to raise, because of the holdings of United States v. White, 401 U.S. 745 (1975) (plurality opinion), and Lopez v. United States, 373 U.S. 427 (1963).

Those cases established that an individual possesses a guarantee of privacy against those government interceptions of messages which are not reasonably expectable by either party. Thus, if one of the two parties to a telephone conversation has fully consented to its recording, as the Government claims Bencsik did on January 2nd and 4th, then neither party may later raise the Fourth Amendment to bar the use of the tapes as trial evidence.[2] United States v.

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[2] 18 U.S.C. §2511(2)(c) also provides that a warrantless police interception of a telephone conversation is not unlawful when one of the parties to the communication has given prior consent to such interception.

Santillo, 507 F.2d 629, 634 (3d Cir.), cert. denied, sub nom. Buchert v. United States, 421 U.S. 968 (1975); United States v. Baynes, 400 F.Supp. 285, 291 (E.D. Pa. 1975). If Bencsik did not voluntarily consent to the Government's recording of his three conversations with Stephen and Michael Kelly, however, then the Kellys are correct that these recordings were an unreasonable invasion of their privacy and therefore should be supressed.

I conducted hearings on the motion to suppress on July 6, 1982, and on August 23, 24, and 25, 1982. The factual circumstances which emerged from these hearings and from the record papers are as follows.

Michael Kelly first met Edward Bencsik in December, 1981. Following a transaction involving the two men in the early part of December, Michael Kelly met with Bencsik again and informed Bencsik that he wished to buy a half-pound of methamphetamine. Bencsik agreed to fill this order. On December 22, 1981, Michael Kelly gave Bencsik $2,000 as a down payment on the methamphetamine. Bencsik later informed the defendants that he would return the money rather than supply them with the desired substance.

By January 1, 1982, Bencsik had not returned the $2,000. On that day Stephen Kelly drove to Bencsik's residence

and, at gunpoint, forced Bencsik to accompany him to his own apartment in Bensalem Township. Stephen Kelly instructed Bencsik that he and his brother wanted Bencsik to supply them with phenyl-2-propanone in order to satisfy his debt. As the Government has represented in its Trial Memorandum, both Stephen and Michael Kelly threatened Bencsik's life at the apartment. The Kellys then drove Bencsik back to his residence in Levittown. At Bencsik's home, Stephen Kelly forced Bencsik at gunpoint to turn over the car keys to a 1969 Plymouth GTX which was parked in Bencsik's driveway. The Plymouth GTX had been sold to Bencsik by the girlfriend of Charles "Chad" Clarkson, a friend of Bencsik. At the time that the Kellys seized the automobile, Bencsik owed Clarkson's girlfriend a substantial balance on the automobile and title was still in her name.

On the following day, January 2nd, Clarkson, who was disturbed over the disappearance of the automobile, contacted the Bensalem Township police. Clarkson apparently presented to the police a "hypothetical" situation involving Bencsik's actual dealings with the Kellys. (Tr. of August 23rd at 94-95). The officer to whom Clarkson gave his report returned within a short time to Clarkson's apartment, where Bencsik also was staying, with Bensalem Police Chief Richard Viola. Viola suggested that Bencsik make monitored telephone calls to the Kellys. (Tr. of August 23rd at 96).

That evening Bencsik made the first recorded telephone call to Stephen Kelly from Chief Viola's apartment. Special Agent Compton of the Drug Enforcement Administration was also present. Two days later, on January 4, 1982, Bencsik made the other two monitored telephone calls from Charles Clarkson's apartment. When those calls were made, Bencsik was in the company of Chief Viola, Compton, Clarkson, and Clarkson's girlfriend.

At various points during the suppression hearings which I conducted on July 6, 1982, and August 23, 1982, Bencsik testified in response to direct questioning that he had voluntarily agreed to make the recorded telephone calls to the Kellys. However, other elements of his testimony created serious doubts in my mind as to whether his consent was truly voluntary. When I asked Bencsik why he had agreed to allow the police to monitor his conversations with the Kellys, he replied, "...I felt as though I was more or less put on the spot...I had been put in that position beyond my own control...I didn't have much of a choice." (Tr. of August 23rd at 96). Bencsik was under pressure to cooperate in the recordings from Clarkson, who had initiated Bencsik's contact with the police. (Tr. of August 23rd at 48).

Chief Viola was aware prior to the first recording of a criminal case pending against Bencsik in the Court of Common

Pleas of Bucks County. Chief Viola did not assure Bencsik of assistance, but Bencsik did receive the impression that Viola would do whatever he could to help. Subsequently, Chief Viola did successfully intercede on Bencsik's behalf in regard to the pending criminal case. Bencsik also was told by Chief Viola prior to at least two of the telelphone calls that he, Bencsik, was late for a court hearing and subject to arrest. (Tr. of August 23rd at 38, 67). Agent Compton's testimony emphasized that no specific inducements were made to Bencsik before he made the telephone calls. However, Agent Compton did reveal at the hearing that he paid $1,000 to Bencsik approximately two days after the last two monitored telephone calls were placed.

Bencsik also revealed at the hearing held on August 23rd that he may well have either ingested or smoked narcotics before the telephone conversations of January 2nd and 4th (Tr. of August 23rd at 42). Agent Compton testified that he was unaware that Bencsik was under the influence of drugs during the three conversations.

The hearings which I conducted on July 6th and August 23rd did not reveal that the law enforcement officials applied directly any coercion, physical or psychological, to Bencsik to obtain his cooperation in the monitoring of the telephone calls. Contrary to the position taken by the Government, this finding does not end my inquiry and mandate admission of the

tapes. Factors other than direct government coercion or the lack thereof must be taken into account in determining whether consent truly is voluntary.

Whether or not an individual has consented to a government search is a question of fact, to be determined by the trial judge through an examination of the totality of the circumstances.[3] Schneckloth v. Bustamonte, 412 U.S. 218 (1973). No simple test for voluntariness exists. As Justice Frankfurter stated in Culombe v. Connecticut, 367 U.S. 568, 604-5 (1961):

> The concept of "voluntariness" is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes.

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[3] In United States v. Bonnano, 487 F.2d 654, 658 (2d Cir. 1973), Judge Friendly stated that "the extent of the proof required to show that an informer consented to the monitoring or recording of a telephone call is normally quite different from that needed to show consent to a physical search, whether by the defendant himself or by some person in a position to give an effective one." While Judge Friendly's statement has been cited in this Circuit, Baynes, supra, 400 F.Supp. 285 at 292, it has not been made the law of this Circuit. Nor does the Bonnano case provide a clear means of distinguishing the type of consent needed in a telephone monitoring case from the type which the government must prove in a physical search case. The individual rights which the concept of "consent" is designed to protect, and the difficulty of defining that concept, are present in physical search and eavesdropping cases alike.

Justice Frankfurter's words point out that the legal definition of "voluntary" necessarily differs from the dictionary definition. The Supreme Court has noted elsewhere that, rather than possessing a strict or inflexible meaning, the term "voluntary" has by tradition "reflected an accommodation of the complex of values implicated in police questioning of a suspect." Schneckloth, 412 U.S. at 224-5.

The hearings which I conducted on July 6th and August 23rd convince me that Bencsik's consent was impermissibly clouded by a combination of factors: his drug use at the time of consent, his apprehension of death or physical harm at the hands of the Kellys, the pressure from Clarkson, and the assurances of help from Chief Viola and Agent Compton. The aggregate effect of these circumstances on the voluntariness of Bencsik's consent was particularly important in light of another factor which emerged from the suppression hearing on August 23rd--Bencsik's highly suggestible nature. Bencsik appeared to me at that hearing to be a much different witness than he had been on July 6th. At oral argument, the Assistant United States Attorney agreed with my assessment on that point. Bencsik appeared so highly suggestible that he was asked by the Assistant United States Attorney whether he was under the

influence of narcotics while he was testifying. On cross-examination he was easily led toward a position which could not possibly be accurate. Bencsik's nature is relevant to my inquiry in light of the Supreme Court's instructions in Schneckloth, 412 U.S. at 229: "In examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents."

The Government claims that Bencsik's own testimony as to the voluntary nature of his consent must be considered controlling (Government Memorandum of Law, page 3). But the case cited by the Government, United States v. Osser, 483 F.2d 727, 730 (3d Cir.), cert. denied, 414 U.S. 1028 (1973), enunciates no such principle. It instead merely holds that a person's consent is not vitiated solely because at the time of his consent he has yet to receive officially his promised grant of immunity. While Osser does state, "[o]ur inquiry on appeal is limited to whether the consent was voluntary and uncoerced, not whether the motivations for it were altruistic or self-seeking," I have not made Bencsik's altruism or lack

thereof the focus of my analysis in this case. Furthermore, it defies common sense that, at a hearing in which one of the factors legitimately in dispute is the impressionable nature of the subject's mind, a district judge acting as trier of fact must take at face value statements of the subject regarding his mental state at a point in the past.

Nor does the interpretation of Osser offered by United States v. Baynes, 400 F.Supp. 285, 292 (E.D. Pa. 1975) conflict with my position. Judge Becker, in dicta, there noted:

> While Osser does not elucidate a comprehensive standard for measuring the validity of consent, it does indicate that so long as pressure is not initiated by the police for the purpose of overbearing the will of the "consenting" party, the authorization is valid.

I do not interpret this passage, as the Government urges, to hold that no factors other than direct coercion may be examined by a district judge in a hearing to consider the voluntariness of consent. Judge Becker's remarks seen in context deal with the contention made in Baynes that police inducement by itself can operate to vitiate consent. In the case at bar, I have considered the representations made by Chief Viola and Agent Compton only as part of a combination of factors preying upon Bencsik's mind at the time of his consent to the tapings. The distinction between the Baynes case and the case at bar is

underlined by Judge Becker's finding there that "there was no evidence that Robinson [the consentor] was threatened or taken advantage of or that he was under the influence of drugs [italics added]." The fact that possible police inducement is only one of the factors which I have taken into account also distinguishes this case from cases like United States v. Acavino, 467 F.Supp. 284 (E.D. Pa. 1979), in which defendants have moved to suppress recordings on the basis of inducement alone.

The Government also attempts to discount the importance of Bencsik's drug use at the time of his consent by pointing to United States v. Cafaro, 480 F.Supp. 511 (S.D. N.Y. 1979), where an arrested suspect, after agreeing to cooperate with the police, was permitted by a government agent to "shoot up" with desoxyn to relieve withdrawal symptoms prior to making monitored telephone calls. The court in that case refused to find that the suspect's consent was invalid. However, the court justified the standard which it employed in that case as the one applicable in a situation "where a defendant has entered a course of cooperation with the Government," on which the consent to tape is merely "a further step." In the situation at hand, by contrast, Bencsik's cooperation in the taping of the Kellys' conversations was itself his first step on the road of cooperation. Indeed, the first of the tapings

occurred on the same day that Bencsik first spoke with the Bensalem police; it therefore is his mental state at that moment and on January 4th which must be ascertained and evaluated in determining the legitimacy of his consent.

The language of the Supreme Court in Schneckloth quoted elsewhere in this opinion was intended to give district judges a large degree of discretion in making factual determinations of voluntariness. A necessary corollary is that district judges possess a responsibility in such determinations to exercise fully their capacities for evaluating testimony, weighing evidence, and drawing reasonable inferences. It is mindful of this need to consider all the relevant circumstances that I have found that the Government has not carried its burden of showing that Bencsik voluntarily consented to the monitoring of the telephone conversations. Therefore, an Order suppressing the tapes as evidence has been entered.

BY THE COURT:

Edward N. Cahn, J.

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 82-1539

UNITED STATES OF AMERICA,
Appellant

vs.

KELLY, MICHAEL

(D.C. Crim. No. 82-00043-02)

No. 82-1541

UNITED STATES OF AMERICA,
Appellant

vs.

KELLY, STEPHEN

(D.C. Crim. No. 82-00043-01)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: GIBBONS, HUNTER and ROSENN, Circuit Judges.

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and were argued by counsel on February 18, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the orders of the said District Court, entered August 25, 1982, be, and the same are hereby reversed and the causes remanded to the said District Court for further proceedings consistent with the opinion of this Court.

ATTEST:

Sally Gross

Clerk

May 31, 1983

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 82-1539

UNITED STATES OF AMERICA

v.

MICHAEL KELLY

SUR PETITION FOR REHEARING

Present SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, Circuit Judges

The petition for rehearing filed by

MICHAEL KELLY

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Judge

Dated: June 24, 1983

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6/24/83

SALLY [illegible]

Clerk

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 1541

UNITED STATES OF AMERICA,

Appellant

v.

STEPHEN KELLY,

Appellee

SUR PETITION FOR REHEARING

Present SEITZ, Chief Judge, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, Circuit Judges

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The petition for rehearing filed by

APPELLEE

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

James A. Hunter

Judge

Dated: June 24, 1983

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FILED AUG 25 1982

UNITED STATES OF AMERICA :

VS. : CRIMINAL NUMBER 82-43-2

MICHAEL KELLY :

O R D E R

AND NOW, this 25th day of August, 1982, it is hereby ORDERED and DECREED that all tape recordings made with the participation of Edward Bencsik, as well as transcripts, are suppressed and may not be introduced at trial in the above-captioned matter.

BY THE COURT:

J.

ENTERED: Aug 25, 1982

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ORIGINAL

UNITED STATES OF AMERICA : CRIMINAL ACTION

vs. :

STEPHEN J. KELLY
MICHAEL KELLY : NO. 82-43

Philadelphia, Pennsylvania

August 24, 1982

BEFORE: HON. EDWARD N. CAHN, J.

APPEARANCES:

FRANK H. SHERMAN, ESQ.,
WILLIAM B. CARR, JR., ESQ.,
Assistant U.S. Attorneys
for the Government

BARRY H. DENKER, ESQ.,
for Stephen J. Kelly

STEVEN A. MORLEY, ESQ.,
for Michael Kelly

REPORTED BY: DAVID S. EHRLICH, CSR, RPR, CP, CM

OFFICIAL COURT REPORTERS
Room 2722
U.S. Courthouse
Philadelphia, Pa. 19106

WAlnut 5-9480

(Proceedings - 9:32 a.m.)

(The following took place out of the presence of the jury and at side bar.)

MR. SHERMAN: Your Honor informed all counsel this morning that after yesterday's hearing concerning Edward Bencsik and the voluntariness of the tape recordings which were made, the Government contends with his consent, that you had had some further thoughts after reading some additional cases, and you gave us the citations to the Osser, Nacrelli and Moskow Opinions in the Third Circuit, and the Court stated that it wanted to hear further argument about this and would resolve it prior to the time that Mr. Bencsik went on the witness stand.

The Government pretrial had filed a Starks Motion with regard to those tape recordings. Stephen Kelly's attorney, and I believe Michael Kelly's attorney, had also filed Starks Motions with regard to those tape recordings pretrial.

THE COURT: I have decided I am going to rule on it right now.

What we had been talking about -- while you were doing that I was rereading the Moskow case.

We were concerned that the way Mr. Bencsik

testified yesterday -- I was concerned that the consent might not be voluntary and meet that prong of the Starks Hearing requirements, because Mr. Bencsik appeared to be a suggestible individual and admitted to the probability that he had used controlled substances at the time his consent was given.

My analysis of the cases called to my attention is that the consent is not voluntary. I had offered the Government an opportunity to brief me on this and argue it completely later in the case at a time when the jury would not be kept waiting while we discussed it. The Government takes the position that the matter should be decided now.

I have decided it. The consent is not valid in my view, and we will proceed with the trial.

MR. DENKER: Thank you.

THE COURT: Now, if you want the opportunity to go to the Court of Appeals for a Stay Order, you can do that.

MR. SHERMAN: First, I would like to be able to consult with Mr. Carr.

THE COURT: We have a jury waiting.

MR. SHERMAN: Then I would like to be able to consult with Mr. Vaira for a moment.

THE COURT: Whatever you want to do.

ORIGINAL

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA : CRIMINAL ACTION

vs. :

STEPHEN J. KELLY
MICHAEL KELLY : NO. 82-43

Philadelphia, Pennsylvania

August 25, 1982

ARGUMENT

BEFORE: HON. EDWARD N. CAHN, J.

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(Proceedings - 9:30 a.m.)

MR. MORLEY: Your Honor, Mr. Denker and I have prepared memoranda.

THE COURT: You may approach the Bench.

MR. MORLEY: Thank you.

(Mr. Denker and Mr. Morley handing documents to the Court.)

THE COURT: Mr. Sherman, do you want to argue in support of your position that Mr. Bencsik voluntarily consented in accordance with the case law and statute?

MR. SHERMAN: I do, your Honor.

THE COURT: You may commence your argument.

MR. SHERMAN: Your Honor, last evening we submitted to the Court a memorandum re the consentual nature of the tape-recorded telephone conversations which covered the evidence which is in the record at this time and the cases which go to this issue.

Today I want to address more specifically some of the factual issues and policy reasons why the Government believes that a decision here that the consent was not validly made would not only be inappropriate on the record, but would have very bad consequences for

future law enforcement efforts.

Before I get into that, let me also say as background that in addition to my remarks yesterday about the importance of this evidence, as the Court knows, Counts 3, 4 and 5 of the indictment specifically charge these defendants with having made telephone calls in furtherance of the conspiracy. That is in fact the charge against them on those counts, and the tape recordings are the best evidence that exist with regard to those counts.

THE COURT: They are the best legal evidence provided valid consent was made.

MR. SHERMAN: Well, whether the consent was valid or not, the tape itself is the best evidence that a call was made.

THE COURT: But, there is a Congressional statute that before that tape can be used as evidence, one of the parties to the conversation must have consented.

MR. SHERMAN: I agree with that, your Honor.

THE COURT: There is no question that it is the best evidence. This is the old story of -- the old tenson between we all know the call was made, but what about the interests of the citizens and

privacy, which was discussed in some detail in the Olmstead case?

MR. SHERMAN: I want to address those things.

In addition, it is clear from the cases that the view of the trial court on the issue of consent is given great weight. In fact, there is no Third Circuit case that we have been able to find and no case from any other circuit that I found, where a trial court has ever been reversed after finding that a consent was validly made.

THE COURT: Are you suggesting that trial courts should just rubber stamp these things?

MR. SHERMAN: Absolutely not, your Honor.

THE COURT: And not look behind the surface?

MR. SHERMAN: Absolutely not. All I am stating, it is obviously an issue which the trial court does have discretion, and that discretion will be given great weight by the Appellate Court.

Now, with respect to the facts here, the one fact that is plain from Bencsik's testimony, and the Court yesterday stated that it so believed, there was absolutely no threat of any type made to

Edward Bencsik by any law enforcement official to get him to consent to make these telephone calls.

THE COURT: Well, I am relying more on Agent Compton's testimony. I felt that at the July 6 hearing he testified truthfully that he did not put any undue pressure on Bencsik. I believe that to be true.

MR. SHERMAN: All right.

THE COURT: I don't think that is the problem.

MR. SHERMAN: In the absence, however, of any Government pressure, under Osser and the other cases, there really is no question if the individual knew that the tape was going to be made and agreed to go forward having that knowledge. And, on this record we have a situation where, on January 2nd, for the first time Bencsik speaks to the police, namely, Keith Maust and Chief Viola, within hours, and I mean two or three hours, Agent Compton is brought into the picture and within half an hour of Agent Compton arriving, the call to Stephen Kelly is made.

THE COURT: I was convinced after the July 6th hearing that there was no problem. What gave me cause for concern was what happened on Monday.

MR. SHERMAN: I understand that. But, I think even taking what Mr. Bencsik said on Monday

into account, if we look at the sequence of events, the consent is apparent, but after he makes the call on the 2nd, two days pass, he is not in custody, he is not under any charges based on his conversations with Viola or Compton; he is in the company of his friends on January 4th when the second series of phone calls to Michael Kelly is made, and yet he again goes forward and makes the telephone calls and thereafter agrees to put a body wire on and go out and deliver the P2P to Michael Kelly at the arranged meeting place.

Now, I would argue, your Honor, that whether or not he was capable mentally of agreeing, the surface facts are that he did agree because --

THE COURT: There is no question about that.

MR. SHERMAN: -- absent the pressure, he went forward.

THE COURT: He did it.

MR. SHERMAN: Right.

THE COURT: And, he did it and there is no evidence that the gun was held to his head to make him do this. That is not the type of coercion we are involved with here.

MR. SHERMAN: Well, then, the only coercion that I can imagine at this stage that would be

concerning the Court would be his own subjective mindset that he had to go along with this for some reason --

THE COURT: Well, I think one of the briefs on behalf of the defendants is more on point. What concerned me was the totality of the circumstances as they evolved at the August 23 hearing. We learned for the first time that there was a probability of the use of controlled substances at the time the consent was given. Again, that fact by itself -- even that fact, coupled with an inducement of leniency, would not make a difference. But, then you add the fact that a payment was made later, even though it was illusory in the sense that there was no contract that it had to be paid, and you then inject the element that Bencsik was a person that appeared to me to be highly suggestible and subject to manipulation, then I became concerned. It is the totality of this. There is no one -- the police did not act improperly. The consent was given without physical pressure being imposed on the subject by the law enforcement officers.

Inducements by themselves are legal and valid. Payment of money by itself is valid. Even the use of narcotics at the time the consent was made is valid, and possibly a highly suggestible person could give a valid consent. But, when you combine all these

five factors, I am concerned, counsel.

MR. SHERMAN: Well, with respect to the drug use, your Honor. Mr. Bencsik himself stated that even if he was using the drugs, it in no way impaired his ability to reason, and Agent Compton, from appearances, wasn't even aware that Bencsik had been using --

THE COURT: I don't have to believe that. I choose to believe that in the totality of this situation, that the Government has not proved by a preponderance of the evidence that the consent was valid.

MR. SHERMAN: Well --

THE COURT: I don't see why that affects the overriding policy of the Government. I think the Government should want District Judges to make that type of an evaluation.

MR. SHERMAN: Well, you, of course, have to make that kind of an evaluation. But, what I am saying is, in light of the rule in Osser, and the cases coming after it in this Circuit, that the issue of consent with regard to tape recordings -- and, we are only talking with that kind of consent issue -- that the issue there is whether the consenting individual's will was overborne in some way.

In this case, even combining all those

factors --

THE COURT: May I stop you there? It is true that Judge Becker, when he was a District Judge, in his Opinion did refer to the thought that it would be improper for the police to use inducements that were overreaching, and he seemed to limit his analysis to actions on the part of law enforcement officers. But, I don't think that is totally correct. I think the Judge can look at the totality of the facts, including the susceptibility of the subject to be manipulated.

MR. SHERMAN: I will grant that, your Honor.

THE COURT: And, even if the police generally acted appropriately, when you add some of these other factors in, the consent becomes invalid.

MR. SHERMAN: But, there is no evidence on this record with regard to the drug use now; there's absolutely no evidence that in any way did that affect Edward Bencsik's ability to comprehend what was happening and to rationally and consentually agree to go forward and make the telephone calls.

THE COURT: Well, maybe it is the way he appeared before me on Monday. I noticed -- remember, we don't have the transcripts -- at least I don't have

the transcript of the Monday situation.

MR. SHERMAN: We don't.

THE COURT: Maybe somebody ordered it. Maybe the media ordered it. But, I recollect that you asked him whether he was under the influence of drugs on Monday. Why did you do that?

MR. SHERMAN: Why did I do it?

THE COURT: Yes. Why did you do it? I was going to ask him, but you asked him before I had an opportunity to.

MR. SHERMAN: I asked him that since he had said on previous occasions he was using drugs, I wanted to assure the Court he was not appearing here under the influence of any drug.

THE COURT: He seemed different on the 23rd than he did on July 6 to me. He was less positive that he gave consent. He began to inject thoughts of pressure and the hypothetical.

So, there is another factor, of course the factor that he is being squeezed by the Kellys on the one hand and allegedly seeking a settlement on the advance payment they made him and the friend seeking payment for the balance due on the car, with the car having allegedly been removed by one of the Kellys; something I did not know on the 6th.

MR. SHERMAN: I agree there were things mentioned at the second hearing that didn't come up at the first.

With regard to the pressure from the Kellys, I believe that is totally irrelevant to his consenting, because that was the very criminal act that was being investigated.

THE COURT: Well, I am trying to determine whether at the time the consent was given, considering all of the facts, it was a voluntary consent.

MR. SHERMAN: And, on the --

THE COURT: The Kellys can't put pressure on him and then say that his consent was invalid. I certainly agree with that. It is a factor I am considering, that's all.

MR. SHERMAN: You asked him a series of questions about Clarkson and several other issues, and after you had gone through all of those things with him I distinctly remember that he still said that he did it voluntarily.

THE COURT: Yes. He did say he did it voluntarily.

MR. SHERMAN: And, he was quite adamant about that. He didn't in any way hesitate in saying

that to your Honor.

THE COURT: I had no problems after the July 6th hearing..

MR. SHERMAN: I am saying he said that on August 23rd.

THE COURT: On the 23rd?

MR. SHERMAN: To you.

THE COURT: Yes. He said the right words on the 23rd at times during the hearing. But, he also said words that caused me to scrutinize his testimony.

MR. SHERMAN: Well, your Honor, if Bencsik could not give a valid consent on this record, then we are left with the situation where in many drug cases and from your Honor's own experience I am sure you know, individuals who come in having made tapes or otherwise appearing as Government witnesses, have in the past used drugs during the time involved; they have in the past gotten themselves into legal problems and felt pressure; they have experienced every single problem that Bencsik alluded to, and if that is going to prevent them from giving a valid consent to making a tape recording, we are going to be in a situation where it is going to be a rare case that a person involved in crime will ever be able to flip and work

with the Government because all we will be left with is the upstanding citizen to walk in and say, I would like to make a tape recording for you, and obviously in most cases those are not the people associating with the defendants.

We don't have any police action here that in any way was improper.

THE COURT: Agreed.

MR. SHERMAN: And, in light of that, I see no basis where the record is clear that the witness did go forward to make the calls to presume that he was not consenting to do that of his own free will. However, many other factors may have been going on in his own mind.

I think what the statute is designed to protect, and what we should be most concerned about, is some type of Government misconduct in obtaining this evidence.

THE COURT: Well, I am concerned about that, and that is in -- so the record is clear, that is not in this case.

MR. SHERMAN: And, in the absence of that, I see no basis for a problem here. Even the Laughlin case, which is one case the defendants can cite to --

THE COURT: How about the Starks case, in the footnote that Mr. Denker surprised me with at the July 6th hearing. It says "without inducement." Now, I believe that that was an unfortunate reference there. I believe the Third Circuit has changed the law in accordance with the cases you cite to me, that an inducement by itself to a consenting individual is not improper and does not vitiate the consent.

All I am saying is, it is a factual matter based on a totality of the circumstances. It is a factual issue, not a legal issue. When someone consents it is factual under the circumstances.

MR. SHERMAN: And, as I understand it, your Honor is saying factually there was no Government misconduct, there may have been a problem totalling up all the other circumstances.

THE COURT: That is what I am saying. And, if the law is that the pressure must be limited to Government misconduct, then if you appeal this ruling that I am inclined to make, so be it; subsequently the tape recordings will be played. If you are inclined to proceed without the tape recordings, you may do that.

MR. SHERMAN: Well, just so -- and, I know your Honor did offer to write a written opinion about this --

THE COURT: If you wish to appeal, I reserve the right to state my reasons. The Court of Appeals likes to have the reasoning of the District Judge set forth.

We have been rambling here. I don't think this dialogue is what we should present to the Court of Appeals.

MR. SHERMAN: All right. But, with respect to the drug situation, I would like, if I could get a little clearer picture of what the Court views as the effect of that on Bencsik in terms of the consent.

THE COURT: It is my perception of him as witness. He was asked by Mr. Denker if he injected or shot the substance, and he said, no, I eat it or smoke it, as I recollect. I don't have the transcript.

MR. SHERMAN: I think that is correct.

THE COURT: And, he was -- the impression I got from his testimony, regardless of the words used was, there was a probability, a good probability -- although I don't remember him saying "good" or "high probability," but, the impression I got was a high probability that he was using drugs at the time the consent was given and the phone calls were made.

Now, that by itself under one case you cite to me would not vitiate the consent. But, in the totality of the situation, when he started waivering on the voluntariness of his consent, that is when I became concerned, and I think I have a duty to look at this.

I don't think I have ever suppressed a a telephone conversation in seven-and-a-half years here.

MR. SHERMAN: I don't think anyone else has either.

THE COURT: This is the first one. I think District Judges should look carefully at this. Invasion of privacy is a serious matter.

MR. SHERMAN: I would ask the Court to consider also in the totality of the circumstances, the quality of the conversations themselves.

THE COURT: That would be a point for the Government, that there is nothing in the conversations that, as I recollect, would show -- you played them on the 6th, right?

MR. SHERMAN: Yes, your Honor.

THE COURT: I don't recollect any slurring or anything that would make me think that the man had been an obvious problem. I just think he -- it is like another factor that made me suspicious of the

consent.

MR. SHERMAN: May I have a moment to confer?

THE COURT: You certainly may.

MR. SHERMAN: Thank you. (Pause)

Your Honor, I don't think I have anything else with regard to the factual record.

With regard to the legal standards, it is the Government's position that the Court can look at other circumstances, of course, beyond simply police conduct; but, that on this record, in light of the witness' actions, in light of the fact that all of the calls were not made on the same day, in light of the fact that the legal standard to be applied is not as high as with respect to --

THE COURT: And, some other types of issues.

MR. SHERMAN: A consent that hurts the witness himself --

THE COURT: I agree with that principle.

MR. SHERMAN: In that situation, I think we have a consent here that meets the requirements of the statute.

THE COURT: I understand that you differ with me.

MR. SHERMAN: And, for that reason --

THE COURT: And, I don't want to suggest to you that I think that this is a clear-cut issue that you can slice consent that clearly. What I am saying is that the burden is on the Government I think, to establish the consent by a preponderance of the evidence, and I had problems accepting Bencsik's testimony as to the consent after I observed him testify on Monday and heard some of the things he had to say, and I ticked off about six things that started to aggregate a problem; and, you have answers to every one of them.

I think it is factual, but if you wish an opportunity to appeal it, we will discharge the jury and give you that opportunity.

MR. SHERMAN: If your Honor is prepared to rule, before we decide about the jury I would like to again be able to confer with the office in Washington.

THE COURT: All right. Let me say this to you, Mr. Sherman: I think you made an excellent argument, you were well prepared, and I appreciate your candor.

We have a little bit of a scheduling problem. I did not remember that in the summer Naturalization Courts are at eleven instead of ten as

they are in June. My last one was in June at 10 o'clock, and I told the jury to come at eleven, and now I won't be able to take them until about a quarter to twelve, and we lost more time unfortunately. Sometimes when you try to be efficient you just spin your wheels, and that seems to be happening here.

So, I can give you until 11:30, if you want to discuss this with Mr. Vaira, Mr. Carr and your Washington office.

MR. SHERMAN: Thank you, your Honor. And, we will report back to you --

THE COURT: So that we all understand what happens here, why don't I sign Mr. Denker's proposed order. The record should show that I read the memoranda presented by the defendants and I read all the cases, pulled all the cases you cited in your brief that you gave me last night at 5:30.

I don't think we have a legal argument as much as we have a factual argument. But, there are some points here that the Court of Appeals could clarify.

My original thought was -- and, Judge Becker made this observation -- that the Court of Appeals has not clearly delineated this line between consent and no consent, and the reason Judge Rosen didn't, in Osser -- incidentally, Osser is

Judge VanArtsdalen's case; I said Judge Huyett's case. But, the reason Judge Rosen didn't, is, in my view, he wanted District Court Judges to be free to make factual determinations, and he intentionally did not draw the line as finely as he might have.

MR. SHERMAN: Your Honor, I can't disagree with that. I only believe that this case is not the one that crossed the line.

THE COURT: All right. I have a feeling that over the years, Mr. Sherman, we will be debating this and that I will never convince you.

MR. MORLEY: Your Honor, in my haste this morning I neglected to prepare an order for Michael Kelly. Perhaps your Honor could amend that also to include Mr. Michael Kelly, or else I can submit an additional order.

THE COURT: Why don't we wait and see what happens. If there is no appeal, then my oral order can stand. If there is an appeal, you should submit a written order today so that the appeal process can start.

You would be appealing this order.

MR. SHERMAN: Correct, your Honor.

THE COURT: And, you can inform your Washington office that I have signed Mr. Denker's

order; that I am going to have Mr. Henderson file it with the Clerk's Office.

MR. SHERMAN: All right.

THE COURT: If you elect to proceed without the tape recording, fine. If not, you will proceed with the appeal.

MR. SHERMAN: And, I assume the ruling covers all three of the tapes.

THE COURT: Yes. All three of the telephone tapes. That is all that is before me.

MR. SHERMAN: January 2nd and 4th.

THE COURT: Right. 2nd and 4th.

MR. SHERMAN: When would you like us to report back to you?

THE COURT: Well, I am going in to Naturalization Court at 11 o'clock promptly. If you know before, I will be in my chambers.

I would like to talk to the jury. If you decide not to proceed, I would like to explain to the jury exactly what is happening so they are not kept in the dark as to all of this scheduling, the scheduling problems.

MR. SHERMAN: Okay. When would we expect to have them back into the courtroom?

THE COURT: I would say about a quarter

to twelve.

MR. SHERMAN: We will have an answer before then.

THE COURT: Is there anything for the record from the defendants?

MR. MORLEY: No, your Honor.

MR. DENKER: No, your Honor.

THE COURT: All right. Then I would expect everybody to be back here about a quarter to twelve, keeping in mind that if I am delayed in Naturalization Court, that is where I am and you should not be offended.

(Court recessed at 10:08 a.m.)

(Court reconvened at 12:53 p.m. in the presence of the jury.)

THE COURT: Members of the jury, you may think that we have been sitting on our hands here while you have been waiting for us. We have not been.

There has been a hearing in this matter involving whether or not taped telephone conversations should be admitted into evidence in this proceeding, and I ruled that they should not be, and the Government has decided to appeal my ruling to a higher court, and, therefore, we will not need you to decide this issue at